

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO**

DAYTON SUPERIOR CORPORATION,

Plaintiff,

vs.

JULIAN Z. YAN, et al.,

Defendants.

*
*
*
*
*
*
*
*
*

Case No. 3:12-cv-00380

Judge Rose

Magistrate Judge Michael Newman

PROTECTIVE ORDER

Before the Court is the Motion of Plaintiff, Dayton Superior Corporation, successor-in-interest to Zea Corporation, Inc. d/b/a Unitex, seeking entry of a protective order (“Motion”) pursuant to Fed. R. Civ. P. 26(c). Because good cause supports granting of the Motion,

IT IS, THEREFORE, ORDERED that the following information and instructions shall guide the disclosure of certain information during the course of discovery until further order of this Court:

[1] **PURPOSES AND LIMITATIONS**

The purpose of this Order is to safeguard the confidentiality of certain proprietary and confidential documents and information that any person or entity may be called upon to produce during the course of the action.

[2] **DEFINITIONS**

2.1 Party: any party to this action, including all of its officers, directors, employees, consultants, retained experts, and outside counsel (and their support staff).

2.2 Disclosure or Discovery Material: all items or information, regardless of the medium or manner generated, stored, or maintained (including, among other things, testimony, transcripts, or tangible things) that are produced or generated in disclosures or responses to discovery in this matter.

2.3 “Confidential” Information or Items: documents and all other information (regardless of how generated, stored or maintained) or tangible things that an attorney on behalf of the party believes in good faith contain information that constitutes, reflects, or discloses its trade secret or other confidential research, financial, personnel, development, or commercial information.

2.4 “Highly Confidential – Attorneys’ Eyes Only” Information or Items: extremely sensitive “Confidential Information or Items” that an attorney on behalf of the party believes in good faith that the information contained therein constitutes, reflects, or discloses its trade secret or other confidential research, financial, personnel, development, or commercial information and is so commercially sensitive and/or confidential that disclosure to any employee of any of the parties pursuant to a designation of “Confidential” will not provide adequate protection to the interests of the party producing the Confidential Information.

2.5 Receiving Party: a Party that receives Disclosure or Discovery Material from a Producing Party.

2.6 Producing Party: a Party or non-party that produces Discovery or Discovery Material in this action.

2.7 Designating Party: a Party or non-party that designates information or items that it produces in disclosures or in responses to discovery as “Confidential” or “Highly Confidential - Attorneys’ Eyes Only.”

2.8 Protected Material: any Disclosure or Discovery Material that is designated as “Confidential” or as “Highly Confidential – Attorneys’ Eyes Only.”

2.9 Outside Counsel: attorneys who are not employees of a Party but who are retained to represent or advise a Party in this action.

2.10 House Counsel: attorneys who are employees of a Party.

2.11 Counsel (without qualifier): Outside Counsel and House Counsel (as well as their support staffs).

2.12 Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a consultant in this action and who is not a current employee of a Party or of a competitor of a Party and who, at the time of retention, is not anticipated to become an employee of a Party or a competitor of a Party. This definition includes a professional jury or trial consultant retained in connection with this litigation.

2.13 Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations; organizing, storing, retrieving data in any form or medium; etc.) and their employees and subcontractors.

[3] SCOPE

The protections conferred by this Order cover not only Protected Material (as defined above), but also any information copied or extracted therefrom, as well as all copies, excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by parties or counsel to or in Court or in other settings that might reveal Protected Material.

[4] DURATION

Even after the termination of this litigation, the confidentiality obligations imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing or a Court order otherwise directs.

[5] DESIGNATING PROTECTED MATERIAL

5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party or non-party that designates information or items for protection under this Order must take care to limit any such designation to specific material that qualifies under the appropriate standards. A Designating Party must take care to designate for protection only those parts of material, documents, items, or oral or written communications that qualify – so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this Order. If it comes to a Party’s or a non-party’s attention that information or items that it designated for protection do not qualify for protection at all, or do not qualify for the level of protection initially asserted, that Party or non-party must promptly notify all other parties that it is withdrawing the mistaken designation.

5.2 Manner and Timing of Designations. Except as otherwise provided in this Order, or as otherwise stipulated or ordered, material that qualifies for protection under this Order must be clearly designated as such before the material is disclosed or produced.

Designation in conformity with this Order requires:

- (a) for information in documentary form (apart from transcripts of depositions or other pretrial or trial proceedings), that the Producing Party affix the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” at the top or bottom of each page that contains protected material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins) and must specify, for each portion,

the level of protection being asserted (either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”).

A Party or non-party that makes original documents or materials available for inspection need not designate them for protection until after the inspecting Party has indicated which material it would like copied and produced. During the inspection and before the designation, all of the material made available for inspection shall be deemed “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the documents it wants copied and produced, the Producing Party must determine which documents, or portions thereof, qualify for protection under this Order, then, before producing the specified documents, the Producing Party must affix the appropriate legend (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”) at the top or bottom of each page that contains Protected Material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins) and must specify, for each portion, the level of protection being asserted (either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”).

(b) for testimony given in deposition or in other pretrial or trial proceedings, that the Party or non-party offering or sponsoring the testimony identify on the record, before the close of the deposition, hearing, or other proceeding, or within 20 days after receiving the transcript from the deposition, hearing, or other proceeding, all protected testimony, and further specify any portions of the

testimony that qualify as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “CONFIDENTIAL.” All depositions shall be deemed “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” until 20 days after receiving the transcript from the deposition, unless the Party requesting to use any part of the deposition as non-confidential or as “CONFIDENTIAL” obtains written authorization from the Party and/or non-party desiring to maintain any part of the deposition as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”.

When it is impractical to identify separately each portion of testimony that is entitled to protection, and when it appears that substantial portions of the testimony may qualify for protection, the Party or non-party that sponsors, offers, or gives the testimony may invoke on the record (before the deposition or proceeding is concluded) a right to have up to 20 days to identify the specific portions of the testimony as to which protection is sought and to specify the level of protection being asserted (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”). Only those portions of the testimony that are appropriately designated for protection within the 20 days shall be covered by the provisions of this Order.

Transcript pages containing Protected Material must be separately bound by the court reporter, who must affix to the top or bottom of each such page the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” as instructed by the Party or nonparty offering or sponsoring the witness or presenting the testimony.

(c) for information produced in some form other than documentary, and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the container or containers in which the information or item is stored the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” If only portions of the information or item warrant protection, the Producing Party, to the extent practicable, shall identify the protected portions, specifying whether they qualify as “Confidential” or as “Highly Confidential – Attorneys’ Eyes Only.” To the extent that any party to this Order prints a copy of a document or thing from a storage space or medium designated “CONFIDENTIAL,” that party is responsible for marking said copy as “CONFIDENTIAL” in accordance with subparagraph a, above. Neither the failure to mark nor the act of marking a copy “CONFIDENTIAL” pursuant to this paragraph shall constitute a waiver of the right to later assert or contest the confidentiality of a particular document or thing.

(d) With regard to documents and things produced electronically, the producing party may designate particular documents confidential by marking them in accordance with subparagraph a above. In addition, if the producing party intends to designate all documents or things contained within a particular storage space or medium (e.g., disk, flash drive, electronic folder, electronic file, etc.) as Confidential Material, the producing party may do so by so informing the opposing parties and by marking and/or naming said storage space or medium as “CONFIDENTIAL.” To the extent that any party to this Order prints a copy of a document or thing from a storage space or medium designated

“CONFIDENTIAL,” that party is responsible for marking said copy as
“CONFIDENTIAL” in accordance with subparagraph a, above.

5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” does not, standing alone, waive the Designating Party’s right to secure protection under this Order for such material. In addition, nothing contained within this Order shall prevent a Party that has provided or produced Disclosure or Discovery Material to another Party prior to the date of this Order from designating qualified information or items contained within such Disclosure or Discovery Materials as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY" so long as such designation is made within thirty (30) days following the date of this Order. If material is appropriately designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY" after the material was initially produced, the Receiving Party, on timely notification of the designation, must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order. [6]

[6] CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. Unless a prompt challenge to a Designating Party’s confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary economic burdens, or a later significant disruption or delay of the litigation, a Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. A Party that elects to initiate a challenge to a Designating Party’s confidentiality designation must do so in good faith and must begin the process by conferring directly with counsel for the Designating Party. In conferring, the challenging Party

must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A challenging Party may proceed to the next stage of the challenge process only if it has engaged in this meet and confer process first.

6.3 Judicial Intervention. A Party that elects to press a challenge to a confidentiality designation after the informal resolution process set forth in Section 6.2 of this Order has been exhausted may file and serve a motion under the Local Rules of this Court that identifies the challenged material and sets forth in detail the basis for the challenge. Each such motion must be accompanied by a competent declaration that affirms that the movant has complied with Section 6.2 of this Order and that sets forth with specificity the justification for the confidentiality designation that was given by the Designating Party in the meet and confer dialogue. The burden of persuasion in any such challenge proceeding shall be on the Designating Party. Until the Court rules on the challenge, all parties shall continue to afford the material in question the level of protection to which it is entitled under the Producing Party's designation.

[7] ACCESS TO AND USE OF PROTECTED MATERIAL

7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a non-party in connection with this case only for prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the litigation has been terminated, a Receiving Party must comply with the provisions of section 11 below (FINAL DISPOSITION).

Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated CONFIDENTIAL only to:

- (a) the Receiving Party’s Counsel, as well as employees of said Counsel to whom it is reasonably necessary to disclose the information for this litigation;
- (b) the officers, directors, and employees of the Receiving Party to whom disclosure is reasonably necessary for this litigation;
- (c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by Protective Order” (Exhibit A);
- (d) the Court and its personnel;
- (e) court reporters, their staff, and professional vendors to whom disclosure is reasonably necessary for this litigation;
- (f) during their depositions, witnesses in the action to whom disclosure is reasonably necessary and who have signed the “Agreement to Be Bound by Protective Order” (Exhibit A). Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Order; or
- (g) the author of the document or the original source of the information and any previous recipients of the document or information.

7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”

Information or Items. Unless otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated

“HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” only to:

- (a) the Receiving Party’s Counsel, as well as employees of said Counsel to whom it is reasonably necessary to disclose the information for this litigation;
- (b) Experts (as defined in this Order) (1) to whom disclosure is reasonably necessary for this litigation, and (2) who have signed the “Agreement to Be Bound by Protective Order” (Exhibit A);
- (c) the Court and its personnel;
- (d) court reporters, their staffs, and professional vendors to whom disclosure is reasonably necessary for this litigation; and
- (e) the author of the document or the original source of the information and any previous recipients of the document or information.

[8] PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a Receiving Party is served with a subpoena or an order issued in other litigation that would compel disclosure of any information or items designated in this action as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” the Receiving Party must so notify the Designating Party, in writing (by email, if possible) immediately and in no event more than three Court days after receiving the subpoena or order. Such notification must include a copy of the subpoena or Court order. The Receiving Party also must immediately inform in writing the Party who caused the subpoena or order to issue in the other litigation that some or all the material covered by the subpoena or order is the subject of

this Order. In addition, the Receiving Party must deliver a copy of this Order promptly to the Party in the other action that caused the subpoena or order to issue.

The purpose of imposing these duties is to alert the interested parties to the existence of this Order and to afford the Designating Party in this case an opportunity to try to protect its confidentiality interests in the Court from which the subpoena or order issued. The Designating Party shall bear the burdens and the expenses of seeking protection in that Court of its confidential material – and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another Court.

[9] UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to execute the “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

[10] FILING PROTECTED MATERIAL

10.1 No Party may file with the Court any document containing or disclosing Confidential Material of another without first obtaining consent from the Court to file the document under seal. All documents that the Court approves for filing under seal shall be filed in a sealed envelope or other appropriate sealed container on which the title of this action shall be endorsed, an indication of the nature of the contents, the words “Confidential Material Subject to Confidentiality Order,” and a statement substantially in the following form:

FILED UNDER SEAL

By order of the Court, entered on [date], this envelope is to remain sealed and the Clerk of Court shall not reveal the contents until further order of this Court.

10.2 All information filed under seal shall be kept under seal until further order of the Court. Where possible, only confidential portions of filings with the Court shall be filed under seal.

10.3 Nothing in this Order is intended to have any effect on trial. If any party desires protection at trial, a separate motion must be filed by them.

[11] FINAL DISPOSITION

Unless otherwise ordered or agreed in writing by the Producing Party, within sixty days after the final termination of this action, each Receiving Party must return all Protected Material to the Producing Party. As used in this subdivision, “all Protected Material” includes all copies, abstracts, compilations, summaries or any other form of reproducing or capturing any of the Protected Material. With permission in writing from the Designating Party, the Receiving Party may destroy some or all of the Protected Material instead of returning it. Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) by the sixtieth day deadline that identifies (by category, where appropriate) all the Protected Material that was returned or destroyed and that affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries or other forms of reproducing or capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney work product, even if such materials contain Protected Material. Any such archival copies that

contain or constitute Protected Material remain subject to this Order as set forth in Section 4 (DURATION), above.

[12] INADVERTENT DISCLOSURE

If a Producing Party inadvertently or mistakenly produces or provides information, documents or tangible items via discovery in this Action that the Producing Party was entitled to withhold subject to a claim of attorney-client privilege or work product immunity, such production shall not prejudice such claim or otherwise constitute a waiver of any claim of attorney-client privilege or work product immunity for such information, provided that the Producing Party promptly makes a good-faith representation that such production was inadvertent or mistaken and takes prompt remedial action to withdraw the disclosure upon its discovery. Within three (3) business days of receiving a written request to do so from the Producing Party, the Receiving Party shall return to the producing party any documents or tangible items that the Producing Party represents are covered by a claim of attorney-client privilege or work product immunity and were inadvertently or mistakenly produced. The Receiving Party shall also destroy all copies or summaries of, and all notes and/or recordings relating to, any such inadvertently or mistakenly produced information; provided, however, that this Order shall not preclude the Receiving Party returning such information from making a motion to compel production of the returned information on a basis other than a waiver resulting from its inadvertent production as part of a discovery production under this Order. Return of the document or thing by the Receiving Party shall not constitute an admission or concession, or permit any inference, that the returned document or thing is, in fact, properly subject to a claim of attorney-client privilege or work product immunity nor shall it foreclose any party from moving the Court for an order that such document or thing has been improperly designated or

should be producible for reasons other than a waiver caused by the inadvertent production. The Producing Party shall retain copies of all returned documents and tangible items for further disposition.

The Court retains jurisdiction to enforce the provisions of this Order and to make such modifications and additions to this Order as the Court may from time to time deem appropriate.

IT IS SO ORDERED ON THIS THIRTEENTH DAY OF NOVEMBER, 2012.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

EXHIBIT A

**AGREEMENT CONCERNING MATERIAL COVERED BY A PROTECTIVE ORDER
ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF OHIO**

I, the undersigned, hereby acknowledge that I have read the attached Protective Order entered in the United States District Court for the Southern District of Ohio, in Case No. 12-cv-380 (TMR) pending therein, and understand the terms thereof and agree to be bound by all such terms. Without limiting the generality of the foregoing, I agree not to disclose to any person or entity not authorized to receive “Confidential Materials” under the terms of said Protective Order, any document or information designated as or constituting “Confidential Materials” or any copies or extracts of information derived there from, which have been disclosed to me. I further agree to use any “Confidential Materials” disclosed to me solely for the purpose of the action and for no other purpose.

I hereby submit myself to the jurisdiction of the United States District Court for the Southern District of Ohio for the purpose of enforcing said Protective Order.

Date: _____

Signature: _____

Type or Print Name